IN THE

Supreme Court of the United States

OCTOBER TERM 1920.

DETROIT UNITED RAILWAY, Appellant, vs. CITY OF DETROIT, et al., Appellees.	No. 492.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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CONWAY BRIEF COMPANY
DETROIT, MICH.

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Appellee, the City of Detroit, moves to dismiss or affirm or advance. We have no objection to the case being advanced, indeed, we wish it advanced and have already made a motion to that effect, but we do object to the granting of the motion to dismiss or affirm.

Before discussing the propositions urged by appellee, we desire to present an important question not considered or discussed in appellee's brief.

IS THIS A CASE WHICH CAN BE DISPOSED OF BY MOTION TO DISMISS OR AFFIRM?

It is clearly not a case which can be disposed of by motion to dismiss. It is an appeal from the District Court in a case involving the application of the Constitution of the United States, and that appeal is expressly authorized.

Section 238 of the Judicial Code reads:

> "Appeals and writs of error may be taken from the District Court * * * * in any case that involves the construction or application of the Constitution of the United States."

Is it a case which can be disposed of upon a motion to affirm?

The ground upon which appellees insist that it can, is stated as follows:

> "Appellee moves to affirm the judgment of the District Court of the United States for the Eastern District of Michigan, for the reason that it is manifest that the Court below had no jurisdiction and that the appeal is taken for vexatious reasons only, and not because of merit in the questions and because the questions involved are so frivolous as not to need further argument."

As the District Court upheld its jurisdiction and granted appellee's motion to dismiss upon the ground that the bill stated no case, it is manifest that the decree cannot be affirmed upon the ground that the Court lacked jurisdiction. That decree is a bar to another suit. If the Court did not have jurisdiction of the case the decree must be reversed.

Can the decree be affirmed upon the ground that the District Court had jurisdiction and the bill did not state a case for equitable relief?

Here, too, is encountered an insuperable objection arising from the remarkable character of the decree entered by the District Court upon appellee's motion. That decree not only dismisses plaintiff's bill for lack of equity, but grants the appellee, the City of Detroit, affirmative relief in the following language; quoted from paragraph 2 of the Decree: (R. pp. 66-67.)

> "That whatever contract, rights, privileges and franchises said plaintiff company may have had in the above described roads have expired, and the defendant city may require said company to cease its service upon streets * * * and to remove its property therefrom, upon giving the notice in time for removal, as required under the terms of the decree entered in the case of *City of Detroit, vs. Detroit United Railway,* pursuant to the opinion found in 172 Mich., p. 136."

Under the pleadings in this case, the utmost that the District Court could lawfully do was to enter a decree dismissing appellant's bill, either for want of jurisdiction or for lack of equity. When that court went farther and granted to appellee, the City of Detroit the affirmative relief above stated, it transcended its authority, and, however, this Court may decide the other propositions presented by this record, it cannot, we respectfully submit, affirm the decree. In this connection attention is called to the circumstances that appellant assigned error for this improper practice.

See assignments of error 2 and 3. (R. pp. 69-70.)

If the Court approves the foregoing reasoning it should deny appellees motion to dismiss and affirm, and in that case we ask that it grant our motion and appellees motion to advance. If it does not approve said reasoning we ask it to read the following part of our brief.

Appellee's counsel make what they call:

"A BRIEF STATEMENT OF THE FACTS"

This statement is neither fair, accurate nor helpful. As there is involved in this case merely the question of the sufficiency of appellant's bill; the facts averred in that bill and only those facts, should be brought to the attention of the court. Appellee's counsel, instead of stating such facts, have stated the facts shown in affidavits attached to their motion, most of which are irrelevant to any issue here involved. It is true they have made some statements concerning the allegations of the bill, but they have so mingled with these statements taken from the affidavits, that what they say will not aid the court to understand the questions involved. As an illustration of counsels' practice we call attention to the reference to the other suits commenced by appellant and to the particularly reprehensible statement:

> "The Detroit United Railway has been very prosperous, paying eight per cent dividends on its watered capital stock * * * besides acquiring, largely out of the Detroit earnings, a vast interurban system, and accruing a large surplus."

Appellees' Brief Page 5.

We respectfully submit that in order to get a clear understanding of the questions involved, this court should

disregard appellee's statement, and look at appellant's statement, in its Motion to Advance, pp. 4 to 7, and at the statements in this brief.

MOTION TO DISMISS BECAUSE NO FEDERAL QUESTION IS INVOLVED.

It is to be noted that in appellee's argument under this heading, no reference whatever is made to the fact that the decree appealed from granted it affirmative relief upon the ground that it had jurisdiction, and that appellee is now seeking an affirmance of that decree. It would seem as if this inconsistency demanded an explanation.

The principal ground upon which appellees contend that the District Court lacked jurisdiction is that there is no relation between our Federal constitutional objection and the proposition of street railway acquisition which we assail. The answer to this complaint is found in the following averments of our Bill.

> "Plaintiff further avers that it is the claim of the defendants that the effect of the vote of the electors of the City of Detroit gives them as city officials, full power and authority to compel said plaintiff to sell to the city its trackage on Woodward Avenue and on Fort Street, and on the day-to-day lines heretofore described for $40,000.00 per mile, which, as heretofore stated, is very much less than its real value and very much less than it would cost the city if it constructed the same; and as to the day-to-day lines, it is very much less than the cost of the said lines to the plaintiff, less depreciation.

"Plaintiff also avers that it is the intention of said defendants to enforce said claim and they have threatened to do so and plaintiff upon information and belief says they intend immediately to take steps to enforce it. * * *

"Plaintiff further avers that after the election and before the votes were canvassed, and apparently upon the assumption that the vote on said proposition as reported by the City Clerk, and hereinbefore set forth, was correct, and therefore before said proposition or said ordinance could become effective, said defendant Couzens by the acquiescence of the other defendants in this bill, caused the work of construction of said street railways to be started, and that it is the intention of said defendant Couzens, acting as mayor of the City of Detroit, and of the other defendants who are subservient to his will and who will execute his will, to at once put in force said street railway proposition, and upon the assumption, too, that this gives the city officials the authority to compel plaintiff to sell its trackage as aforesaid, without giving plaintiff or any other persons the opportunity of having an adjudication as to the legality of the same, and thereby deprive plaintiff of its property without due process of law, in contravention of the due process clause of the 14th Amendment of the Constitution of the United States." (R. pp. 20-21.)

For a statement of the illegal methods which the defendants propose to adopt for the enforcement of this claim see the averments of the Bill of Complaint. (R. pp. 16, 17, 19, 20 and 21.) For a discussion of these methods see pp. 19-20 of this Brief.

In answer to other reasoning of appellees' counsel under this heading, we say that these jurisdictional averments in the bill are not to be eliminated therefrom, nor disregarded, because defendants did not lawfully possess and could not lawfully exercise the powers they threatened to exercise. See our Brief on Motion to Advance, pp. 8 to 17 and authorities there cited. See particularly.

Home Telephone Co. vs. Los Angeles, 227 U. S., 288.

Cincinnati vs. Traction Co., 245 U. S., 446.

Cuyahoga Power Co., vs Akron, 240 U. S., 462.

It is equally clear that these averments are not to be eliminated from the bill or disregarded, because counsel concede that defendants did not lawfully possess and could not lawfully exercise the threatened powers.

For further discussion of this subject see page thirteen of this brief.

MOTION TO AFFIRM UPON THE GROUND THAT THE BILL ON ITS FACE DISCLOSES NO EQUITY.

Appellees' counsels' statement under this heading is not fair nor accurate.

They have so stated the case that the real merits of appellant's bill do not appear.

They have not so stated the case as to present fairly, nor have they fairly discussed the following proposition upon which appellant relies.

THE SCHEME OF ACQUISITION OF WHICH THE PROPOSITION VOTED ON IS A PART, INVOLVES IN EFFECT AN ATTEMPT TO DEPRIVE APPELLANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

In our motion to advance this proposition is discussed from two points of view. The first will be found on pages 9 to 11 of that motion. The second will be there found immediately following. Our discussion there of the first point of view we think to be sufficient in opposition to defendant's motion as well. But we deem it proper to present with more detail our reasoning on the second point of view.

Our claim (which appellees' counsel misstate) is in substance:

(a) That since the expiration of the original franchises plaintiff has acquired the right to continue the operation of the tracks covered thereby, not only by ordinances and resolutions of the Common Council expressly recognizing the necessity of continuance, but also by large and continued expenditures necessary for such continuance and made under the direction and permission of the city authorities, and with tacit consent and approval of such expenditures and such continued operation, both by the city authorities and by the people of the city themselves. That in consequence plaintiff has acquired not new franchises for a definite term, but the right to continue these tracks in operation so long as the public interest may require; a right which is not terminable by the arbitrary action of the city.

(b) That the city's scheme of acquisition of a municipal system does violate these rights—contrary to the Fourteenth Amendment.

Our reasoning is as follows:

Tracks upon the streets now occupied by those portions of the Fort Street line and the Woodward Avenue line, the original franchises of which have expired, are essential to the proposed municipal system, and municipal tracks thereon can only be acquired either by taking over the existing tracks of the plaintiff, or by removing those tracks and replacing them with new ones. The city plan, then, necessitates either getting our property by purchase or destroying it by removal.

It appears by explicit averment of the bill that notwithstanding the expiration of these original franchises, the company has, through municipal action recognizing the necessity of continued operation, and granting the right to continue, and through its own expenditures upon these lines since the expiration of the original grants, made by authority of the municipal officials and with their acquiescence and that of the people of the city, acquired the right to continue these tracks until their discontinuance shall be consistent with public interest.

If under these facts the city has lost the right of immediate ouster, which arose at the expiration of the original franchises, and the company has acquired a right to continued operation, that is a valuable property right which the city cannot terminate at its arbitrary will.

It is maintained by the defendants that because under the Michigan constitution, Article VIII, Sec. 23, a municipality cannot grant a public utility franchise not subject to revocation at its will without the affirmative vote of three-fifths of its electors voting thereon, the company has not acquired any right to continue these

tracks, but that their removal may be required now as it might have been at the time of the expiration of the original franchises.

Does this constitutional provision preclude the acquisition, without a popular vote, of a right in the nature of a franchise right, revocable whenever its termination shall be consistent with the public interest?

The question is whether such a right can be created either by grant or by estoppel. It is our position that although under the Michigan constitution a popular vote is necessary to validate the grant of a *term* franchise, a right, in the nature of a franchise, to continue the use of tracks until their discontinuance shall be consistent with public interest, may be created either by consent or grant of the municipal officials, or, in the absence of such grant, may be created by the acquiescence of the people of the municipality in the improvement and continued operation of such tracks pursuant to the direction and consent of the municipal officials. As a municipality may be estopped through action or acquiescence of its officials in a matter over which they have power, so in a matter over which the people have power, it may be estopped by the people's acquiescence in, and tacit approval of, action taken under the direction of the municipal officials. In the present case the right to continue rests upon both grounds, grant and estoppel.

The constitutional prohibition against the grant, without popular vote, of any public utility franchise, not subject to revocation "at the will of the city or village," does not mean that rights acquired without a popular vote may be arbitrarily terminated. The public will, which determines the revocation, is not uncontrolled and

absolute. It is to be exercised if and when the public interest requires, and not otherwise.

The Supreme Court of Michigan expressed this distinction in their decision in *Peck vs. Detroit United Railway,* 180 Mich. 343, where they sustained the validity of a franchise grant which by its terms was to be ended "by the Common Council or the people of the City of Detroit at their pleasure or caprice." The Court say that the most that can be claimed for the grant in question "is that it is a revocable right. It is immaterial whether it is termed a grant, license, franchise or permit. Its important feature in this discussion is that whatever it is termed, it is revocable at the will of the city *whenever the public interest requires its termination.*" (See opinion, p. 347.)

The decision of *Denver vs. Denver Union Water Company,* 246 U. S. 178, necessarily involves the principle for which we contend.

The city ordinance, whose validity was attacked in that case, recited that the Water Company was a mere tenant by sufferance, and declared that it was made to regulate its charges "during the time it shall further act as a water carrier and tenant by sufferance in said streets." The ordinance was presented to the city council by initiated petition of electors, and was passed by the council without reference to popular vote (See opinion, p. 188). The Colorado Constitution contained, Article XX, Section 4, relating to the city and county of Denver, (I Mills Statutes, Colorado, p. c-277), the provision that *"no franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors."*

(The brief for appellee states with reference to this case (see p. 21) that "There was no constitutional prohibition against such action.")

It was contended on behalf of the city that as the company was merely a tenant by sufferance, its property was subject to immediate removal at the arbitrary will of the city, and therefore must, for the purpose of fixing a reasonable return upon its value, be taken at junk value. The court, however, construed the ordinance (p. 190) as "the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver;" and held that the property of the company must therefore be valued as property in use.

In this Denver case it was the ordinance of the Council which was held to give a franchise right of indefinite duration, *notwithstanding the constitutional inhibition upon franchises granted otherwise than by popular vote.*

In *Detroit United Railway vs. Detroit*, 248 U. S. 429, this court held an ordinance which purported to regulate the rates of fare on the company's entire city system, including both franchise and non-franchise lines, and which by its terms was to remain in force a year unless amended or repealed, to amount "to a grant to the company for further operation of the system during the life of the ordinance," which necessitated a fair return to the company upon its investment. The decision is based by the court upon the decision in the Denver case, although the provision of our state constitution is not referred to.

These cases definitely hold that under conditions similar to those existing in the case at bar, new rights—indeterminate franchises—were granted to the company by the action of the city, to continue until the interest of the public will warrant revocation. Therefore the most that the city can claim, would be that when legally in a position to provide the service the public needs, the city might terminate the grants.

While we do not assent to this claim, which wholly ignores the company's interest, we submit that the city could not terminate the grants at least until legally qualified to acquire or provide a street railway system. Appellant insists that the city, because of the invalidity of the adoption of the proposition for street railway acquisition is not in a position legally to provide such a system and therefore cannot now terminate these grants. The court therefore must determine whether the proposition so adopted does give valid authority to purchase or construct the system needed, for proceedings to take appellants property, if that adoption gave no valid authority, would be taking that property without due process of law. It follows therefore that a Federal question is presented under the allegations of the bill that the proceedings under which the city proposes to take appellant's property are invalid. It follows also that the city cannot terminate appellant's rights because not legally in a position to provide a street railway system, and that it is the company's duty to continue service at least until such legal authority is acquired by the city.

In this connection the further question will arise whether under any authority that may be conferred, the city can terminate the company's rights in streets where at the city's instance it has expended millions of dollars to enable it to serve the public needs, until it is pre-

pared to deal equitably with the company by paying the fair value of the property it proposes to take.

If an indeterminate franchise can be created by ordinance, it may equally be created by estoppel. If the Common Council might create a continuing right to operate the Fort and Woodward lines by passing an ordinance, they might do so by recognizing the necessity of continued operation, and directing and permitting the expenditures which made continued operation possible. And the acquiescence of the people shows their approval of the action of the city officials.

The continued operation of these lines after the expiration of their franchises was necessary in the public interest and was so recognized by every one.

Early in 1909, the year when the city claims the Woodward Avenue franchise expired, and the year before the expiration of the Fort Street franchises, the Common Council authorized payment of the expense of investigating the street railway situation undertaken with a view to continuance of service in the future. To a bill filed to enjoin this payment from city funds, the city and its officials made answer as appears by the report of the case, *Attorney General vs. Circuit Judge,* 157 Mich. 615 (see pp. 617-618) saying among other things that certain street railway franchises are to expire in November, 1909, "That these defendants are informed and believe that the character of the population, the manner in which the city has been built, is such that street railway service is essential in order to accommodate the people from day to day. That it is necessary to take steps to continue the street car service. That the City of Detroit as a municipality is powerless to engage in this enterprise itself, and that it is incumbent upon the officers of

the City of Detroit to make an investigation and ascertain, if possible, upon what terms and upon what conditions the city may continue to enjoy street railway facilities."

This was before the city was given the power to acquire a municipal street railway system. The course of action of the city authorities directing and authorizing expenditure by the company to enable the continuance of the service, the necessity for which the city thus solemnly recognized, began immediately in 1909 and was pursued in the years following. It was provided for by the Common Council by ordinance and by resolution. There was needed, in order that operation might continue and the lines give efficient service, large and continued expenditures of money. Those expenditures were made in part under explicit direction, and in all cases with the permission of the municipal officers. The public knew of these things, tacitly approved them, and have enjoyed their benefits for some seven years after the time when by the Fort Street decree, the city's power of ouster was made legally effective.

Defendants assert that notwithstanding these arrangements for continued operation, the company's expenditures upon the strength of them, and public acquiescence and approval, the Fort Street decree is still enforcible, and that the city may compel immediate removal of the line on that part of Woodward Avenue where the franchise expired in 1909.

It is held, however, in an early Michigan case, whose authority has never been questioned (*Ramsdell vs. Maxwell*, 32 Mich. 285) that where, after a decree for possession under a foreclosure sale upon which a writ of assistance might have issued, a new arrangement is made

between the parties under which the mortgagor continues in possession, a writ of assistance cannot thereafter be issued, and the question of the right to continued possession cannot be determined on the application for such a writ, but must be litigated independently.

This is a direct authority that the Fort Street decree is no longer enforcible.

See also

Barlow vs. Beattie, 28 N. J. Equity 412.

Judge Dillon, in discussing this subject says that a municipal corporation

> "does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted against the public but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time but upon all the circumstances of the case to hold the public estopped or not as right

and justice may require" (3 Dillon, Municipal Corporations, 5th Ed. Sec. 1194).

City Railway Company vs. Citizens Street Railway Company, 166 U. S. 557.

This case was an appeal by the Citizens Street Railway Company to enjoin the defendant from disturbing it in the construction, operation and maintenance of its street car system. The right to injunction depended upon the validity of an ordinance extending the plaintiff's original franchise for seven years. It was attacked mainly on the ground of want of consideration for the extension. After the passage of the extending ordinance, the company had floated a refunding loan upon the strength of the extension. The court say (p. 566):

"While this transaction cannot properly be termed a legal consideration for the ordinance since the negotiation of the new loan was neither a benefit to the city nor a detriment to the Railway Company, yet we think that the subsequent negotiation of the loan operates against the city by way of estoppel. All that is necessary to create an estoppel in pais is to show that upon the faith of a certain action on the part of the city, which it had power to take, the company incurred a new liability; as for example, by the negotiation of a new loan and the issue of a new bond and mortgage to secure the same. Under such circumstances, justice to the bondholders who have in good faith invested their money in reliance upon the validity of such action demands that the city shall be held to its contract notwithstanding there may have been originally no consideration to support it."

Essex vs. New England Telegraph Company, 239 U. S. 313.

In this case the town of Essex was enjoined from interfering with the operation of lines owned by the appellee company, which was plaintiff below. It appeared that while the company had in 1884 made application pursuant to the Massachusetts statute to the Essex Selectmen for a right-of-way for their lines, that application was never granted, but shortly thereafter the lines in question were constructed and for some twenty years were maintained at large expense along the town highways, and that during many years no objection was made to their operation. After stating that had the records of the Selectmen shown that in response to the company's application they had given a writing specifying the location of the lines and character of the construction and they had been constructed accordingly, such lines would be protected against exclusion or other arbitrary action by the town, the opinion continues (p. 221):

> "With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment (citing cases) and like reasons may demand similar protection to the possession of a telegraph

company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. (Citing cases, including the City Railway case above referred to and the section we have quoted in Dillon, Municipal Corporations.)"

In each of the two cases last cited, the municipality had power by a prescribed method to grant a franchise right, but that method was not pursued. It was held nevertheless to have been estopped by its acquiescence in the exercise of the right which might have been granted.

In the case at bar there was municipal power to grant the right which we claim. Admitting for the purpose of the argument that a popular vote would be necessary to the validity of such a grant, the people may estop themselves by their acquiescence in the exercise of the right in like manner as the municipal officials would estop themselves by a similar acquiescence had the right to make the grant lain in them.

If the company has, under these circumstances, a property right in the portions of the Fort and Woodward lines where the original franchises have expired, not terminable at the arbitrary will of the city, does the scheme of acquisition of the proposed municipal system violate that right?

To carry out its plan, the city must either obtain this trackage by purchase or remove it and put in new tracks of its own. The scheme is either to compel a purchase at an inadequate price by threatening illegal removal, or actually to compel removal by illegal means, and to carry out this plan at once without affording any opportunity to test its validity by legal proceedings.

That the execution of such a scheme would deprive plaintiff of its property without due process of law does not require argument. The cases are numerous and uniform.

Cuyahoga Power Co. vs. Akron, 240 U. S. 462;
Cincinnati vs. Traction Co., 245 U. S. 446;

are directly in point.

They have not so stated the case as to present fairly, nor have they fairly discussed the following important question:

WAS THE PROPOSITION TO ACQUIRE THE STREET RAILWAY SYSTEM SO SUBMITTED TO THE VOTERS THAT THEIR AFFIRMATIVE VOTE THEREON AUTHORIZED SUCH ACQUISITION?

The ordinance provided for the acquisition of a street railway system on two classes of streets: on those where there were, and those where there were not existing street railways. The ordinance, in explicit terms, provided for the acquisition of the entire system by construction. It contained these words (R. p. 33):

> "and said Board of Street Railway Commissioners shall construct, own, maintain and operate for said City of Detroit * * * a system of street railways upon the surface of the streets, avenues and public places herein designated."

This ordinance was ineffectual, unless the proposition of acquisition, which it contained, was approved by the electors of the city under the following provision of the State constitution:

> "nor shall any city or village acquire any public utility * * * unless such proposition shall first receive the affirmative vote of three-fifths of

> the electors of such city or village voting thereon at a regular or special municipal election."
>
> (*Constitution of Michigan*, Article VIII, Sec. 25).

The common council of the city, who framed the ordinance also had the duty of framing and did frame the proposition to be submitted to the electors, but in doing so they omitted the language of the ordinance above quoted, limiting the method of acquisition of the entire system to construction, and used the following ambiguous language (R. pp. 34, 40):

> "Shall the City of Detroit be authorized and empowered to *acquire*, own, maintain and operate a street railway system * * * as hereinafter designated (following with the description of the different lines) * * * so as to make a complete street railway system; and to make the necessary purchases of lands * * * and things necessary to construct, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places herein designated, and to purchase or construct such * * * buildings as may be required to maintain and operate said street railway system."

So that it is not true, as stated in appellee's brief, page 23,

> "A reading of the ballot, whose language was prescribed fully in Section 2 of the Ordinance (R. p. 34) shows that the proposition was fully described in precise elaboration, and that nobody could misunderstand it."

What is true is this, that by omitting the words requiring construction, the proposition of acquisition sub-

mitted to the voters was ambiguous and susceptible of being understood as authorizing acquirement either by purchase or by construction, although, it is undisputed that because of specific requirements of the city charter set forth on page 18 of the record, it does not authorize purchase. Taking advantage of this ambiguity in the statement, and having in mind the fact that a large proportion of voters desired to purchase existing lines, and to use the power of construction only where there were no existing lines, the city officials who were charged with the duty of submitting the proposition, issued and distributed among the voters before the election explanatory statements which they styled "official information" as to the proposed street railway plan, which statements assured the voters that all existing lines upon streets included in the proposed municipal system would be acquired by purchase. This assurance to the public was especially effective because in that way the people would avoid the impairment and disruption of service necessarily consequent if these lines were torn up and new lines constructed by the city in their place. Appellee's brief ignores the foregoing important circumstance that these explanatory statements to the voters were made by the officials who were charged with the duty of submitting the proposition to the voters, and were issued by them in their official capacity. Appellee's statement would give the impression that the only representations made to the voters were the ordinary campaign speeches and campaign literature made or issued by individuals of the community who favored or opposed this proposition; and notwithstanding that the only question before the court is the sufficiency of plaintiff's bill, they venture to refer to the affidavit of Mr. Couzens as proof that "the proposition and ordinance were debated from every angle" (See their brief, p. 24).

The question then is whether the proposition to acquire was so submitted to the voters that their affirmative vote upon it authorized the acquisition. We have shown that the proposition as submitted was ambiguous in form, and that its effect was misrepresented to the voters by the officials who submitted it. If this official assurance that these lines were to be purchased had been given in the proposition as printed on the ballot, no one would contend that there was a legal submission of a proposition for constructing these lines. But the assurance given by the common council by publication and distribution to the electors in the manner it was given, was even more effective than had it been printed upon the ballot. It was distributed at their homes long enough before the election to give them an opportunity for examination and conclusion as to what the proposition was.

This court would refuse to see a manifest truth if it failed to recognize the potency of such assurances. If the court is to disregard these assurances as the trial judge did, because they were not contained in the proposition submitted, then a legal way is opened to the officials submitting the proposition to nullify the constitutional provision requiring submission. Is it not true in law, as it is in fact, that the official explanations of the proposition were part of the proposition itself? While it is true that the making of this official explanation was not required by law, neither was it forbidden; and we respectfully submit that it was within the province of those charged with the duty of submission to make an explanatory statement of the proposition to the voters for the purpose of enabling them to correctly understand it.

Surely officials charged with the duty of submitting this proposition cannot so submit it as to obtain an affirmative vote by official false pretenses.

Those charged with the duty of submitting this proposition to the electors should so submit it that the electors will understand it. Indeed, that is the necessary implication of the Michigan constitutional provision heretofore quoted, requiring submission.

Dillon, regarding the submission of propositions to popular vote, says:

> "Even where there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be submitted *in such manner as to enable the voters intelligently* to express their opinion upon it."
>
> (2 Dillon, Municipal Corporations, 4 Ed. Sec. 891);
>
> *Boseman vs. Sweet,* 246 Fed. (C. C. A. 9th Cir.) 370.

Here a bond issue was submitted under a statute providing that a 3 per cent debt limit should not be exceeded except upon popular vote. The form of submission stated the question to be as to the issue of bonds, in a specified sum, without stating that such an issue would exceed the debt limit. The submission was held bad because the voters were entitled to be informed that the issue would increase the limit.

> *Beers vs. Watertown* (S. Dak.) 177 N. W. Rep. 502.

In this case the issue of certain bonds purporting to be authorized by a popular vote was enjoined. By statute the common council could appropriate money for purchase or erection of a system, or part of a system, to

provide light, heat and power for municipal, industrial and domestic purposes, and submit to the electors the question of issuing bonds to provide the necessary funds. The form of submission was, whether the city should issue bonds in a specified amount to construct or purchase a system to provide light, heat and power for municipal, industrial and domestic purposes. It carried. The bill (which was demurred to) averred that the electors voted in the belief that the amount of bonds authorized was enough to provide a complete system furnishing electricity for industrial and domestic, as well as municipal purposes; that the amount authorized was in fact inadequate for the three purposes, and that the council planned a system to furnish light and power solely for municipal purposes. The reasoning of the court sustaining the issue of an injunction is as follows (p. 505):

> "It may be that facts exist which would fully justify the council in providing an electric system for municipal purposes only; and it would certainly have full authority under the statute to do so if it had funds properly available for that purpose. It may be that the electors of the city would gladly authorize the issuance of bonds for the purpose of getting such a limited system; but they have not so voted. The council would have no right to use the funds from the bonds for purposes other than those contemplated by the electors. To knowingly start in to use these funds when the council knew that they were insufficient to accomplish the contemplated purposes, and when the council intended to provide a system radically different than what the electors were led to expect, would be as gross a perversion of the funds as to use them for a purpose entirely strange to that for which they were authorized."

Appellees cite *Jones vs. McDade* (Alabama) 75 Southern Reporter, 988, as authority for the proposition that the ordinance having been published in extenso, according to law, the conclusive presumption is that the electors ascertained its terms from such published authorized text. In that case the question related to the validity of the submission of a constitutional amendment. It was submitted in accordance with the applicable constitutional provisions, and there was nothing ambiguous on the face of the ballot, nor were any official misrepresentations made concerning its character.

Appellee's counsel assert (citing numerous cases) that the voters in the present instance were quasi legislators, and that courts cannot determine the motives or reasons which induced their vote. These cases cited lay down the familiar rule that courts will not hold legislative action invalid because legislators who enacted it were actuated by improper motives, and therefore will not investigate allegations as to motives. The question here is different, and these authorities are inapplicable. The question here is whether the constitutional provision requiring a proposition to acquire a public utility to be submitted to the electors is complied with where the proposition is so submitted as to lead the electors to vote for it because they believe its meaning to be the precise opposite of its legal meaning. While it may be true that the common council acted in a legislative capacity in adopting the ordinance of acquisition, it is by no means clear that the electors in voting upon the proposition submitted, acted in that capacity; and if they did, it is true, we submit, that they did not act in a legislative capacity in any such sense that the rule under consideration can be invoked to prevent courts granting appropriate relief for the improper submission. Surely the

defendants who made this submission cannot, when called to account, escape responsibility by contending that the court cannot determine the matter because in voting for the proposition the electors were acting as legislators. For, if this be so, the constitutional provision requiring submission can be entirely disregarded by those officials whose power it was intended to limit.

We respectfully submit that for a correct statement of our bill, and as to whether or not it made a case for equitable relief, the court should look at our brief in support of Motion to Advance, pp. 18 to 29, and at this brief.

APPELLANT'S MOTION TO AMEND BILL AND THE COURT'S DENIAL THEREOF

This is a comparatively unimportant matter and we would not refer to it had not appellees' counsel asked the court to disregard the averments in the Bill that appellant had made expenditures and done various acts in pursuance of resolutions of the Common Council upon the ground that appellant:

> "positively refused to incorporate a sample of them (said resolutions) in the Record before the court below." (See appellees' Brief, p. 18).

What is true is this. That after the trial court had rendered its oral opinion sustaining appellees' motion to dismiss, appellant moved to amend its Bill of Complaint by incorporating in its body a reference to and to attach as exhibits, copies of the proceedings of the Common Council, showing that city funds were used to pay for

printing and distributing to the voters the official explanation of the street railway proposition hereinbefore described. (Record, pp. 61-64),

The disposition of this motion is shown by the following excerpt from the court's order thereafter made.

> "The Court having offered to grant leave to amend said bill as proposed by the plaintiff conditionally, however, upon plaintiff's further amending its said bill as proposed by the defendants by appending thereto as exhibits copies of the resolution of the Common Council of Detroit, described in general language in Section 5 of said bill, and the plaintiff having declined to accept said condition.
>
> Ordered that said motion for leave to amend said bill * * * be and the same hereby is denied" (R. p. 65).

We respectfully submit that it was highly improper for the court to refuse to grant our motion to amend our bill unless we would also amend it upon an altogether different subject, in such a manner as to please the defendants. (We assigned error on this refusal see Assignment of Error 13, R. p. 71).

We likewise submit that the averments in the Bill concerning these resolutions were sufficiently definite to answer all the requirements of pleading. (They are found in the Record, bottom paragraph, p. 7).

AFFIDAVITS ATTACHED TO APPELLEE'S MOTION

No doubt it was proper for appellee to prepare affidavits in reply to that filed in support of appellant's motion for an injunction.

It is clear, however, that the statements in the affidavit of Mayor Couzens have no relation to that motion, and have no other purpose than to make the case appear different from that stated in appellant's Bill of Complaint. The question before the court is whether appellant's Bill states a case. This is to be determined from the averments of the Bill and it cannot be decided on ex parte or conflicting affidavits. WE RESPECTFULLY SUBMIT THAT THE AFFIDAVIT OF MAYOR COUZENS IS IRRELEVANT, AND UPON THAT GROUND WE MOVE THAT IT BE STRICKEN FROM THE FILES. IF THE COURT DENIES THAT MOTION, IN THAT CASE AND ONLY IN THAT CASE WE ASK IT TO READ AND CONSIDER THE COUNTER AFFIDAVIT OF MR. BURDICK HERETO ATTACHED.

We respectfully submit that Appellees Motion to dismiss or affirm should be denied and that Appellant's Motion and Appellees' Motion to advance granted.

ELLIOTT G. STEVENSON,
Attorney for Appellant.

JOHN C. DONNELLY,
WILLIAM L. CARPENTER,
P. J. M. HALLY,
H. E. SPALDING,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM 1920.

DETROIT UNITED RAILWAY, Appellant, vs. CITY OF DETROIT, et al., Appellees.	No. 492.

Eastern District of Michigan, ss:

Ellsworth J. Burdick being duly sworn says that he is Assistant General Manager of the above named appellant and makes this affidavit to be used in opposition to appellees' motion to dismiss or affirm, made in the above entitled cause.

Affiant says that he has read the affidavit of James Couzens, Mayor of the City of Detroit in support of said motion; that it is not true as therein stated that the so-called day-to-day agreements were inaugurated after the decision in May, 1913, of Detroit United Railway vs City of Detroit, 229 U. S., 39, but on the contrary, the first of those agreements were made in 1911.

SUITS COMMENCED BY APPELLANT OR BY OTHERS WITH APPELLANTS APPROBATION IN REFERENCE TO THIS MATTER.

There are six such suits:

1. This suit.

2. Suit of *New York Trust Company vs. City of Detroit, et al.*, in United States District Court for the Eastern District of Michigan in Equity. This suit is in every material respect like suit No. 1, except that the jurisdiction is based on diverse citizenship. It was dismissed on motion of defendants for lack of equity and it is expected that it will be appealed to the United States Circuit Court of Appeals unless an early decision of suit No. 1 makes such an appeal unnecessary.

3. *Ellsworth J. Burdick, (this affiant), vs. City of Detroit.* Quo warranto in Wayne Circuit Court to have the election of April 5th, 1920, set aside upon the ground that the ballots cast by the voters were exposed and void, and should not be counted. Under the laws of Michigan an exposed ballot is void. It is claimed that they were exposed because they were printed on such thin paper that when they were folded the vote of the electors could be seen. It was also claimed that they were so folded that their choice could be seen. It was also, so claimed, that they were actually exposed.

4. *The Detroit United Railway, et al., vs. City of Detroit, et al.* This suit brought in the District Court of the United States for the Eastern District of Michigan sought to restrain the defendants from constructing

tracks on Harper Avenue and from interfering with the appellants construction, maintenance and operation of tracks thereon, principally on the ground that the defendant's action impaired certain franchises of the appellant and one of its subsidiary corporations.

The suit sought also to restrain defendants from using city funds in the purchase of municipal street railway bonds issued on authority of the election of April 5th, 1920, and from issuing and selling any such bonds.

5. *Detroit United Railway vs. City of Detroit, et al.*, in the Wayne Circuit Court in Chancery. This suit commenced May 12th, 1920, sought to restrain the defendants from street railway construction on Charlevoix Avenue and from using any moneys of the City, including moneys taken from the sinking fund, either in paying for such construction or in the purchase of any bonds authorized to be issued for street railway acquirement in the election of April 5th 1920. It did not pray to have that election declared void. The case was heard on an application for an injunction, but no decision has been rendered.

6. *Detroit United Railway vs. City of Detroit, et al.*, in Wayne Circuit Court in Chancery. This suit commenced August 11th, 1920, sought to enjoin the purchase by the city of any street railway construction bonds issued under authority of the election of April 5th, 1920, and to enjoin the use of any city moneys in payment for such bonds, or in payment upon certain street railway construction contracts made after the contract involved in suit (5), and that certain sales of such bonds to the City Treasurer and the City Sinking Fund Commissioners be declared void. The bill does not pray to have the election of April 5th declared void. This matter was heard

on a motion for an injunction which was denied, and is now pending in the Supreme Court of Michigan. That court having issued an order to show cause why a mandamus should not be granted to compel the issuance of such injunction.

The ground upon which in said cases No. 5 and 6 the annulment of the purchase of said bonds from city's moneys was asked was

That the City Charter required that municipal street railway construction should be financed entirely by the sale of public utility bonds for the retirement of which a sinking fund created out of the earnings of such municipal street railway system was provided and that the use of tax money for such construction was forbidden. The applicable provisions of the City Charter being as follows:

> "The Common Council shall sell all or any part of said bonds (public utility bonds) at any time and from time to time upon the request of the Board (Board of Street Railway Commissioners) and pay the proceeds to the city treasurer, *and said proceeds shall be used* for the purpose of securing in some one of the ways here provided a public street railway system in the city • • •" (Charter, Sec. 9, p. 67).

After providing for other bonds, known as Street Railway Bonds and which are a lien upon the municipal street railway system only, the Charter continues:

> "The Common Council shall issue and sell enough of said street railway bonds to complete the payment of the purchase price or the award in condemnation proceedings or the cost of construction, and whenever any extension to said

> street railway system is authorized • • • the Common Council shall issue and sell a further and additional amount of said street railway bonds sufficient to pay the actual cost of the extension and no more. It shall pay and deliver into the city treasury the proceeds of said additional issue of street railway bonds and out of said proceeds the board shall pay the cost and expenses of said extension" (Charter, Sec. 12, p. 68).

The Charter further provides that the rate of fare on said street railway system shall be sufficient to pay and there shall be paid therefrom operating and maintenance expenses, taxes and fixed charges, and

> "A sufficient per cent per annum to provide a sinking fund to pay the principal of the mortgaged bonds issued at their maturity, and such other additional per cent per annum to provide in the sound discretion of the Board, a sinking fund to pay the principal of the general bonds issued as soon as practicable, to the end that the entire cost of said street railway system shall be paid eventually out of the earnings thereof." (Charter, Sec. 14, pp. 68-9).

That the purchases of bonds attacked in these suits were made in part from general funds of the city, raised by taxation and appropriated to specific municipal purposes, and in part from the general city sinking fund (which fund is derived mainly from taxation), and of which the only lawful use, (except temporary investment in securities other than those of the city) is purchase or payment of outstanding city indebtedness, not of unissued city bonds which are not part of the outstanding city debt.

The applicable provision of the charter relative to sinking fund is as follows:

> "Such Board (Board of Sinking Fund Commissioners) shall from time to time upon the best terms it can make, purchase or pay the outstanding debt of the city, or such part thereof as it may be able to purchase or pay until the same be fully purchased or paid * *. Whenever the Board cannot arrange for the purchasing or paying such debt or any part thereof, it shall temporarily and until it can so arrange, invest the moneys belonging to said sinking fund in such securities bearing interest as it deems safe and advisable." (City Charter, Sec. 11, p. 134).

In short, the attack upon the bond purchases in these suits rests on the proposition that municipal street railways cannot be built from taxes by the device of having city officials buy with tax money the bonds issued to finance such construction, instead of directly appropriating tax money to construction, and that the general city sinking fund cannot be used to create instead of to retire city debt.

As to the alleged re-sale of most of the bonds so purchased on behalf of the city to the public, it is enough to say that as these bonds were unlawfully issued, but are probably enforceable by those who innocently purchased them upon the re-sale, the proceeds of such re-sale cannot reimburse the city funds out of which the city bonds were unlawfully issued in the first instance, but should be held as a fund for the payment of the re-sold bonds.

Affiant says that suit No. 7 described in Mr. Cousens affidavit commenced by residents of Clairmount Avenue, and suit No. 8 therein described commenced by residents

of Eliot Avenue, were not instigated by appellant and appellant has, and has had, nothing whatsoever to do with the same It is true that Mr. Bernard F. Weadock, described in Mr. Couzens affidavit as attorney for the plaintiff in suit No. 7 was formerly the General Attorney of appellant, but he is not now and has not for a considerable time, been in any way connected with appellant. It is also true that Messrs. Donnelly, Hally, Lyster and Munro, stated in Mr. Couzens affidavit to be attorneys for plaintiffs in suit No. 8, are counsel for appellant, but it is also true that said firm have many other clients and carry on a general law business in the City of Detroit, and doubtless among those other clients are the plaintiff in suit No. 8.

Affiant denies that either of said six suits is trivial or vexatious in character. He avers that each of said suits was brought in pursuance of the advice of appellants' counsel in the belief that the same was well founded, and that it was necessary that the same be commenced and prosecuted to protect its rights.

Suits Nos. 5 and 6 are similar in character and were heard together upon the application for injunction, but for some reason which affiant does not know and cannot state, no decision was made of the motion for injunction in case No 5.

Affiant further says it is not true, as stated in the affidavit of Mr. Couzens, that apppellant, "publicly stated they would harass and embarass the public authorities," with a series of vexatious lawsuits if municipal ownership and operation was attempted. But it is true that in the course of the campaign preceding the election of April 5th, 1920, representatives of appellant did claim that the proposition of municipal ownership championed by Mayor

Couzens was illegal and that suits would be instituted to prevent its consummation in the event of its receiving a favorable vote.

Affiant further says that it is not true that appellant has for many years last past paid quarterly dividends of 2% (8% per annum.) The truth is that it has paid dividends of that amount for not exceeding four years last past; prior to that it paid 7% per annum, prior to that 6%, prior to that 5% and from September 1st, 1907, to December 1, 1910, it paid no dividend whatsoever. Since it commenced paying dividends March 1st, 1901, to the present time (its last dividend was paid September 1st, 1920), its average dividends paid have been less than 5% per annum, approximately 4¾%.

Owing to the fact that the amount of the capital stock of appellants corporation totaling Fifteen Million Dollars is much less than the total net value of appellants property, a dividend of 8% is less than 4% on the actual value of the stockholders interest in the property.

Affiant further says that it is not true as stated in Mr. Couzens affidavit that the profits from appellants lines in the City of Detroit have been sufficient to practically construct and acquire an interurban system of great value. What is true is that appellants city earnings have been barely sufficient and most of the time utterly inadequate, to pay operating expenses and a reasonable return upon capital invested, and that not one dollar of appellants earnings from its city lines have been used for the construction or acquisition of its interurban system.

The statement in Mr. Couzens affidavit that appellant caused to be published the legal opinion therein set forth declared by Henry C. Walters and others, is

erroneous. Affiant says that he believes such opinion was given and published but appellant had nothing whatsoever to do with either procuring or publishing the same.

It is true, as indicated in Mr. Couzens affidavit, that in the municipal ownership campaign preceding the election of April 5th, 1920, it was publicly contended by those opposed to the project that the proposal to acquire street railway lines by purchase was illegal; but those who made this claim did not succeed in convincing any large percentage of the voters of its truth, largely because Mayor Couzens and his official associates branded it as false and whenever they deemed that course expedient issued and extensively circulated what purported to be official documents assuring, or tending to convince the electors, that their favorable vote for the municipal street railway proposition insured the acquisition by the city of appellants Woodward Avenue and other lines.

Exhibit 1 hereto attached and made a part hereof is one of these documents. This particular document was issued and extensively circulated among the electors of the city interested in the subject matter thereof only a few days before the election of April 5, 1920.

In explanation of this exhibit, it should be stated that the Hamilton cars therein referred to are cars on one of appellants lines built under a day-to-day agreement made in 1911. The Woodward Avenue line therein referred to is a line owned and operated by the appellant under a franchise which it is claimed expired in November, 1909. For the purpose of making a necessary explanation of the same, affiant calls attention to the statement in the Exhibit reading:

> "The Hamilton line north of Webb and Burlingame will be of little value to the D. U. R. They

will undoubtedly turn the balance of lines over to us unless they make a transfer arrangement with the city. The city will have the bulk of the traffic on its end."

The city proposed to take that part of appellants Hamilton line south of Webb and Burlingame Avenues, but did not propose to take that part north of Webb and Burlingame Avenues, such north part being within the separate municipality of Highland Park. Also for the purpose of making a necessary explanation affiant calls attention to that statement in the Exhibit reading:

"With the city operating the Woodward Avenue line below Milwaukee, the D. U. R. will be without millions of short haul passengers it now has."

The city proposed to take that part of the appellants Woodward Avenue line running from Milwaukee Avenue south to the river, but not that part north of Milwaukee Avenue.

Affiant further says that there are many other erroneous statements in Mr. Couzens affidavit, which he does not specify because he is advised and believes that by so doing he would do nothing which would be of aid to the court in determining appellees motion to dismiss or affirm.

Ellsworth J. Burdick.

Subscribed and sworn to before me this 4th day of November, 1920.

(Seal)

Warren E. Talcott,
Notary Public, Wayne County, Michigan.

My commission expires August 13, 1921.

EXHIBIT 1

D. U. R. MIS-STATEMENTS

Because They Fear the City's Car Plan and Know It Will Succeed.

To the Citizens of Detroit:

There are several statements being made by the D. U. R. which should be corrected.

Mis-Statement No. 1. That the riders on the Hamilton cars north of the Grand Belt will have to transfer to Grand Belt cars to get down town.

Correction: There will be Through Hamilton cars bringing them all the way down town via Woodward Avenue.

In addition there will be a certain number of Hamilton cars which will carry people across the city to the east side instead of making them transfer.

The city's plan provides for *cars* being *transferred* to other lines instead of the *people*.

Mis-Statement No. 2. That Hamilton line riders north of Webb and Burlingame will have to pay an extra fare.

The Hamilton line north of Webb and Burlingame will be of little value to the D. U. R. They will undoubtedly turn the balance of lines over to us unless they make a transfer arrangement with the city. The City will have the bulk of the traffice on its end.

If the Company does not reciprocate through its good sense, their freight and interurban business can be hampered in its entry to the city, forcing them to make the arrangement.

Mis-Statement No. 3. Passengers north of Milwaukee on Woodward Avenue will have to pay a double fare.

With the city operating the Woodward Avenue line below Milwaukee, the D. U. R. will be without millions of short haul passengers, it now has.

If they do not immediately see the wisdom of linking up their end of Woodward Avenue line with ours, the city's plan provides for a line of its own out John R Street, the cars crossing over from Woodward at Milwaukee.

Study of the City's plan will reveal that here is an instrument which will make the D. U. R. come to time at last.

It is ridiculous for the Company to say that it will not make a transfer arrangement with the City. It has to if it wishes to keep out of bankruptcy.

If 60 per cent of the people vote "Yes" on April 5 there will be no more trouble with the D. U. R.

Yours truly,

James Couzens,
Mayor.

(The signature on the original exhibit is a fac-simile.)